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Chairman: Mr. CHATURVEDI (India)

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AGENDA ITEM 137: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SIXTH SESSION (continued)

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The meeting was called to order at 10.15 a.m.

AGENDA ITEM 137: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SIXTH SESSION (continued) (A/49/10, A/49/355)

1. Mr. Yoon-Kyung OH (Republic of Korea) expressed his appreciation to the International Law Commission for the valuable work done during its forty-sixth session, praised its Chairman for his lucid introduction of the Commission's report, welcomed the completion of the draft statute for an international criminal court and paid special tribute to the Working Group on a Draft Statute for an International Criminal Court, which had done the drafting, and to its Chairman for their significant achievements.

2. In resolutions 47/33 and 48/31, the General Assembly had requested the Commission to give priority to the question of a draft statute for an international criminal court, reflecting the sense of the international community that the time had come for the acceptance of individual responsibility for international crimes and the establishment of a criminal court to deal with them. Blatant violations of international norms must no longer be allowed to go unpunished for lack of an effective tribunal. The draft statute offered a sound and balanced basis for further discussion and deserved thorough scrutiny by Member States.

3. Subject to giving the matter more detailed study, he wished to make the following comments: first, as to the establishment of the court, he favoured a body that would act when needed rather than a standing body. Although making it an organ of the United Nations would lend the court authority and legitimacy, that could give rise to a number of difficult legal problems. Thus, establishing the court by a multilateral treaty and linking it to the United Nations by a specific agreement was a flexible and practical approach that seemed preferable. As to the composition of the court, he did not see the point of making a rigid distinction between judges with criminal law experience and judges with competence in international law.

4. Secondly, turning to the jurisdiction of the court, he considered the new draft a definite improvement over the previous one in two ways: the provisions on jurisdiction had been simplified and clarified. Precision in the definition of a criminal court's jurisdiction was essential. The same applied to the principle of nullum crimen sine lege, which required specific definitions of crimes. While article 20 might not be sufficiently precise, the current formulation appeared to be adequate for further discussion, because the statute was primarily a procedural instrument.

5. Thirdly, as to the acceptance by States of the court's jurisdiction, he was pleased to note that the new draft adopted the "opting-in" system as a general rule. That system should not, however, frustrate the very purpose for which the court had been established, which was to bring criminals to justice. Consequently, two exceptions must be allowed to the requirement for acceptance:

the matter of inherent jurisdiction over the crime of genocide and any case of recourse to the court initiated by the Security Council.

6. Fourthly, while the provisions regarding criminal proceedings had been improved in the new draft, some aspects remained problematic: for example, article 26 (5), which allowed the Presidency to review a decision of the Prosecutor not to initiate an investigation or not to file an indictment, could substantially undermine the independence of the Prosecutor; article 42 on the principle of non bis in idem provided that the principle was not applicable if the act in question had been characterized as an ordinary crime; and lastly, there was the omission of another important issue, the financing of the court.

7. The gross violations of basic human rights over the past few years in Bosnia, Rwanda and elsewhere had created a long-awaited momentum for the establishment of a permanent criminal court. The international community must not let slip that opportunity to create a mechanism to combat crimes of international concern. Thus the draft statute must gain as widespread support as possible if the prospective court was to be an effective body. It was important to seize the promising moment, but it was no less crucial to find common ground. Before a diplomatic conference was convened, time was needed for careful study of the draft and for States to hold intensive consultations, either in a preparatory conference or informally, in order to reach a consensus on pending issues.

8. Mr. KOTSEV (Bulgaria) commended the Chairman of the International Law Commission for his lucid presentation of its report and expressed appreciation for the substantial progress made at its forty-sixth session, in particular the final adoption of the draft statute for an international criminal court. He also thanked the other members of the Commission and the Secretariat staff for their dedication and professionalism.

9. By giving priority to consideration of the draft Code of Crimes against the Peace and Security of Mankind and more specifically to the expeditious completion of the draft statute for an international criminal court, the Commission had not only heeded the request of the General Assembly in resolution 48/31 but had also proven its ability to meet the urgent expectations of the international community. Bulgaria had always supported the proposal for the establishment of an international criminal mechanism with jurisdiction over the most serious violations of international law, and it reiterated its strong commitment to combating those crimes in all their forms. It was confident that the eventual creation of an international criminal court would be an efficient means of deterring the possible perpetrators of such crimes.

10. The current draft statute was a significant improvement over the previous one and was a flexible and well-balanced document that reconciled the need for an international criminal court and the respect for State sovereignty. Furthermore, it was in compliance with the principles of national criminal justice systems and with the international legal instruments in force in the field of criminal law. The premise that the court should be complementary to national criminal justice systems was a sound one, because that would facilitate

its acceptance by the various States and enhance effective suppression of the most serious crimes of international concern.

11. The draft was a good basis for negotiations with a view to achieving consensus. Nevertheless, some shortcomings should be pointed out, as well an area of disagreement, which were due to the complicated and sensitive nature of the subject. First, with regard to the establishment of the court, Bulgaria would prefer that to be done by means of a multilateral international treaty since that would give the court prestige as an objective and impartial institution. Furthermore, the relationship between the United Nations and the international criminal court should be established by a separate agreement, which should stipulate that the United Nations would assume the financing. His delegation found it acceptable that the court would function as a permanent judicial institution but would meet only when required to consider a case submitted to it. Regarding the election of the judges, there was too categorical a distinction between persons with criminal trial experience and persons with competence in international law, and it would be sufficient to require one or the other of those qualifications.

12. Secondly, on the complex issue of the jurisdiction of the court, Bulgaria supported the distinctions in new draft article 20, which provided for two categories of crimes subject to the jurisdiction of the court, namely, crimes under general international law and crimes established under treaties. For the rest, a more careful analysis had to be done of the crimes listed in the annex, since some of them could be better prosecuted through inter-State cooperation based on the principle of aut dedere aut judicare. Bulgaria also supported the idea of voluntary acceptance of the jurisdiction of the court, except in cases of "inherent jurisdiction" in relation to the crime of genocide or in instances where the Security Council submitted a case under Chapter VII of the Charter.

13. With regard to the system of acceptance by States of the jurisdiction of the court, Bulgaria had expressed the view at the previous session that it would be best for that jurisdiction to be compulsory for States parties to the statute. It nevertheless understood the pragmatic approach consisting of the "opting-in" system provided for in article 22.

14. On the subject of the law applicable by the court, there was no doubt that the sources of applicable law should be the Statute of the court, related agreements, the general principles of international law and, to some extent, the provisions of national law. The previous year, Bulgaria had maintained that the internal law of States should not serve as a source of applicable law even indirectly because, since crimes and penalties were defined differently in internal law, the result would be a violation of the principle of the equality of all before the court and before the law. That led to the question of subject-matter jurisdiction, which should be based on rules of international law that were well defined and generally accepted by the international community. The most appropriate international instrument for establishing the substantive basis in law required for the efficient functioning of the court was the draft Code of Crimes against the Peace and Security of Mankind. The Commission should expedite its work on the topic and define the different categories of the most

serious crimes and related penalties; in that way the principle nullum crimen nulla poena sine lege would be observed.

15. Bulgaria, committed as it was to combating the most serious international crimes in all their forms, was in favour of the establishment of an effective international criminal court based on broad acceptance by States. Further efforts should be made to achieve a broad consensus and finalize the text of the draft statute. The most effective approach would be for the General Assembly to take speedy action by initiating the preparatory process and convening a diplomatic conference on the issue in the near future.

16. Mr. NATHAN (Israel) congratulated the Commission for the thorough and painstaking work accomplished in drawing up the draft statute for an international criminal court, a task fraught with highly intricate problems on account of the wide variety of legal systems of the States involved. It was assumed that at some future stage the statute might be linked to the code of crimes against the peace and security of mankind, of which it might form an integral part.

17. While acknowledging the important changes introduced in the draft under consideration, he wished to make some comments. With regard to the relationship of the court to the United Nations (article 2), the court should not necessarily be part of the United Nations system as a judicial organ. To ensure the greatest possible acceptance and effectiveness, a treaty commitment was essential. Likewise, the relationship between the United Nations and the court should be established by means of an agreement. Regarding the qualification and election of judges (article 6), he did not consider it an absolute requirement for all judges to have criminal trial experience, but it was essential that a majority of judges should have such experience, in particular in the trial chamber. He further suggested that provision should be made for the right of judges to resign, as provided for in the Statute of the International Court of Justice. With regard to the disqualification of judges (article 11, para. 3), the ground for requesting such disqualification should be specified. The procuracy (article 12) should be independent of the court and not an organ of the court. The wording: "The Procuracy is an independent organ of the Court" in article 12 seemed contradictory. The procuracy might be either "independent" or an "organ of the Court", but not both together.

18. On the question of privileges and immunities (article 16), the provision that judges would enjoy privileges and immunities while holding office even when the court was not in session appeared far-reaching in comparison with Article 19 of the Statute of the International Court of Justice. Referring to the rules of the court (article 19), he did not deny the special importance of rules of evidence in a criminal trial, but did not think that such rules should be specified in the statute itself. On the other hand, the rules laid down in article 41, paragraph 1 (g) and in article 44 might usefully be amplified by including some of the basic rules of evidence.

19. The crimes within the jurisdiction of the court should be of a particularly heinous character, should be of international concern and should lend themselves

to precise definition. They should be universally accepted to be criminal acts and, in the case of treaty crimes, the treaties should have secured the widest acceptance by the international community.

20. Under article 20, a distinction was made in the draft between two categories of crimes, subparagraphs (a) to (d) dealing with crimes under general international law, and subparagraph (e) dealing with "treaty crimes". Article 20 should have expressly included the term "terrorism" on the ground that, with reference to an enumeration of specific criminal acts directed against the civilian population, the offence of terrorism met all the necessary requirements for inclusion and was recognized as an offence under international law. In subparagraph (c), the term "serious violations" of the laws and customs applicable in armed conflict was not sufficiently clear, and subparagraph (e) provided for a limitation of the court's jurisdiction in regard to the treaty offences listed; while such a limitation might be necessary in order to ensure that the court would be seized only of exceptionally serious offences, it might give rise to serious problems of interpretation and application.

21. The list of crimes pursuant to treaties contained in the annex to the statute should not, at least for the time being, include Protocol I Additional to the Geneva Conventions because, unlike the Conventions, it did not meet the requirement of widespread, if not almost universal acceptance. On the other hand, he agreed to the suggestion by the representative of Canada to include the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving Civil Aviation, supplementary to the 1971 Montreal Convention.

22. In article 21 (b), a further requirement should have been acceptance by the State of the accused's nationality. With reference to article 22, he supported the opting-in procedure for accepting the court's jurisdiction, but he had reservations concerning the provisions of article 23, because the Security Council was a political body and should on no account be involved in the prosecution of individuals. In fact, if it were the first organ to determine that an act of aggression which was the subject of the complaint had been committed, its decision might prejudice the ultimate finding of the court. It would therefore be preferable to delete the article.

23. In the matter of prosecution, under article 27, the prosecutor should be authorized to amend the indictment upon leave by the presidency. The far-reaching exceptions contained in article 37 to the principle that the accused should be present during the trial should be restricted. With regard to article 38, he suggested that the accused should be allowed to plead that the indictment did not disclose an offence under the statute, to request further particulars regarding the indictment and to plead for an amendment of the indictment.

24. Article 39 (a) should be more specific and should provide that the act or omission constituted a crime under article 20, which implied that it also constituted a crime under international law. The latter part of subparagraph (b) should be reworded to read "unless the act or omission

constituted a crime under the relevant treaty at the time the act or omission occurred".

25. Referring to article 41 (g), he pointed out that under Israeli law the accused enjoyed the right of silence and the right to refrain from giving evidence, but that such silence might be interpreted as adding to the weight of evidence for the prosecution and providing corroboration of such evidence where such corroboration was required. Regarding evidence, he suggested that a paragraph should be added to article 44, reading: "Other rules of evidence shall be made under the rules of evidence to be included in the Rules of Court made under article 19". Paragraph 3 should contain a provision that the ruling in question should be given after hearing the parties or their representatives.

26. Article 45, paragraph 1, dealing with quorum and judgement, should provide for all members of the trial chamber to be present at all stages of the trial, in which case paragraph 3 could be deleted because all trial chambers would then be composed of an uneven number of judges. In addition, paragraph 5 should provide for the possibility of dissenting judgements. With regard to article 47, dealing with penalties, there should be the utmost certainty regarding the applicable penalty and the accused should be sentenced in the first place in accordance with the rules obtaining in the State in which the crime was committed and where the accused should have been brought to justice.

27. With regard to article 49, his delegation considered that, subject to article 50, paragraph 3, and save in cases where evidence was wrongfully excluded by the trial chamber, the appeals chamber should not hear evidence. A provision should be added in subparagraphs (a) and (b) empowering the appeals chamber to remit the case to the trial chamber with such instructions as it deemed fit, including the hearing of new evidence and the issuance of a new judgement.

28. Turning to article 51, he said that the court should have the power to demand the temporary transfer of a witness for purposes of confrontation and adduction of evidence, with the necessary provision for subsistence, travel expenses, and so forth.

29. Lastly, he suggested with regard to article 53 that the accused should be given the right to challenge the warrant for arrest and transfer in the manner and in accordance with the procedures generally provided for under extradition conventions and that there should also be provision for release on bail, pending transfer. Paragraph 4 of the article raised the question of giving priority to a request from the court over those from requesting States under existing extradition agreements. He suggested that the requested State be given an option in that context.

30. Mr. CHIMIMBA (Malawi) endorsed the purposes of the draft statute for an international criminal court and considered that the text prepared by the Commission was a balanced one. However, the preamble raised a number of fundamental questions concerning inter-State relationships and the relationship between the State and the individual, which would have to be addressed before

the international conference of plenipotentiaries was convened to adopt the statute. The legal implications of the establishment of the court for the development of international law would have to be assessed and the role of the court in the international legal order envisioned.

31. The establishment of an international criminal court severely tested the principle of sovereignty in contemporary international law and it would be necessary to ascertain whether a proper balance had been achieved. When temporary tribunals of that kind had been established to investigate very serious events, had the reasons adduced been more fundamental than the mere choice between a permanent and a temporary institution? And what impact would a permanent court have on international relations?

32. With regard to crimes for which the court would have jurisdiction, it was perhaps appropriate to draw a distinction between "individual" and "system" criminality, in other words between crimes committed for selfish reasons and those committed on a large scale with the encouragement or acquiescence of the authorities. Some of the treaties that had been listed in the annex regulated or prohibited conduct only on an inter-State basis and were therefore likely to raise problems connected with the different ways in which States perceived the relationship between municipal and international law.

33. Although the draft statute contained guarantees for the accused, it was not clear whether the question of the fairness of the whole system had been fully addressed. For example, would it be fair to transfer the accused from a national to an international jurisdiction, particularly where the latter institution was permanent? There were human rights considerations that raised the question of whether a proper balance had been achieved.

34. The relationship between the court and the United Nations was another issue that required deliberation. The possibility of a reform of the Organization, which would probably involve the amendment of the Charter, was currently being discussed. It did not therefore seem far-fetched to propose that the court should be one of the principal organs of the Organization, so that the question would form part of the package of proposed reforms. In conclusion, he said that he was not in favour of the immediate convening of an international conference but would prefer to see the issues raised by the adoption of the statute addressed in a preparatory process, which could also be linked to the activities of the United Nations Decade of International Law.

35. Mr. HILGER (Germany) said that events in recent years had shown that there were circumstances in which States were unable to prosecute criminals and, where appropriate, convict them. The large number of regional conflicts in which international humanitarian law and human rights were seriously violated indicated that there was an urgent need to take practical steps to achieve a form of universal criminal jurisdiction. Germany had therefore been gratified when the Security Council had adopted the resolution establishing an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law in the territory of the former Yugoslavia and, aware of its obligations in that regard, had prepared a bill,

recently submitted to the legislative bodies, designed to place cooperation with the tribunal on a firm foundation.

36. The draft statute prepared by the Commission was a welcome approach to the creation of a permanent international criminal court, which would have to be established by a treaty. From a substantive point of view, the treaty should preferably form part of the Charter of the United Nations but in view of the ensuing difficulties it would probably be necessary to opt for a multilateral treaty. A key question was how the court could be linked to the United Nations and it had been envisaged in that connection that the Security Council should be in a position to refer matters to it. A further question requiring close examination was the court's administrative and financial integration into the United Nations system.

37. Under the Commission's draft statute, States that became parties to the treaty would accept ipso jure the court's jurisdiction in respect of the crime of genocide. That ex officio jurisdiction should be extended inasmuch as the system of declarations of acceptance could lead to the court exercising no or very few practical functions because there were an insufficient number of declarations, even though a sufficient number of States had agreed to its establishment.

38. Some points called for reflection. The fact that article 12 provided for the complete independence of the office of the prosecutor gave cause for concern. To ensure the adequate representation of the international community's interests in the international criminal court, the activities of the prosecutor should be linked to the decisions of an organ of the United Nations in a way yet to be specified. The rules of the court also called for further reflection: regulations regarding the conduct of investigations and of the trial, particularly the taking of evidence, should be laid down in the statute itself. In addition, the fact that article 20 referred to various categories of offences without specifying their constituent facts or elements raised doubts with regard to the principle of clarity and definiteness, which must be respected in criminal law. As it stood, article 20 did not comply with the principle that an offence could only be punished if criminal liability had been determined before the act was committed. That shortcoming should be redressed, inter alia in the light of the corresponding provisions of the Statute of the International Tribunal for the former Yugoslavia. Article 28 was far from satisfactory: the statute should set forth unambiguous conditions for the arrest of suspects and ensure that they were brought before the competent judge within a short time.

39. As far as the accused was concerned, the rights set forth in article 41 ought in principle to suffice, but regulations on legal assistance, particularly for cases in which the court had to assign defence counsel, should be added. With regard to sentencing (article 46), it should be made clear that the essential basis was the offender's guilt, while the individual circumstances of the convicted person and the gravity of the crime played only a supplementary role. Lastly, the lack of a specific range of punishments in the statute was a matter of concern. The wording of article 46 (2) would be acceptable, however,

if the words "the court may have regard to" were replaced by "the court must have regard to".

40. In general, the draft was an excellent basis for codification. It would therefore be a good idea to convene an international conference, provided that it was carefully prepared, to discuss the draft Statute in detail with a view to concluding a convention.

41. Mr. KARAM (Egypt), referring to the draft statute for an international criminal court, said that the need for a permanent organ of that character had first been felt some 50 years earlier, at the end of the Second World War. That need was becoming increasingly urgent with the daily witnessing of horrendous crimes. While some favourable developments had marked international relations in recent years, including the ending of the cold war and the establishment of détente between East and West, it currently appeared that those favourable developments had had adverse effects at the regional and subregional levels, where conflicts were intensifying, civil wars abounded and criminality and instances of rape, genocide and "ethnic cleansing" were on the increase.

42. The United Nations had responded to that situation by establishing ad hoc tribunals to try separately the breaches of international humanitarian law, including the International Tribunal for the former Yugoslavia, whose jurisdiction it was considering extending to cover the atrocities committed in Rwanda. Establishing ad hoc tribunals meant devoting time and considerable effort to concluding the relevant agreements. His delegation considered, therefore, that a permanent court would be an appropriate judicial organ to try individuals accused of committing serious international crimes and that, if it was a sole source of authority, the court would be able to avoid the risk of conflicting decisions that could rob judgements of some of their legal force.

43. As far as the draft statute was concerned, the best option would be to establish the court's relationship to the United Nations by means of a convention along the lines of that to be concluded between the United Nations and the International Tribunal for the Law of the Sea. The other methods proposed would give rise to serious difficulties. First, the idea that the court should be regarded as the principal judicial organ of the United Nations conflicted with Article 1 of the Statute of the International Court of Justice and would involve amending both the Statute and the Charter of the United Nations. The second variant, namely, making the future court a subsidiary organ of the International Court of Justice, had little chance of being accepted, given the differences of nature and jurisdiction between the two courts, which militated against a hierarchical relationship.

44. As to the proposal that the relationship to the United Nations should be established by a resolution of the General Assembly, he said that that method had already been followed in the application of a number of international conventions. In that regard, he cited the cases of the Human Rights Committee and the Committee on the Elimination of Racial Discrimination. The situations involved, however, were radically different: by virtue of its status and the nature of its functions, the court must command a high degree of independence

but did not require a large secretariat department to process the cases submitted to it.

45. It would be advisable to redraft paragraph 2 (a) and paragraph 3 of article 42. While establishing the new international criminal system would doubtless lead to greater efficiency and integrity, such a result could not be achieved without the cooperation of the national courts, whose justice the international court must supplement, without taking over their functions or disregarding their judgements or decisions.

46. Article 23 (1) should also be reconsidered, since a reading of it and of article 23 (3) gave rise to some ambiguity in the light of the rights of States referred to in article 21. If the court wished to keep its credibility intact, the exercise of its jurisdiction must be devoid of any political orientation and of the pressure of international relations. In general, there was nothing wrong in empowering the Security Council to refer particular cases to the court, but such referral must be without prejudice to a State's entitlement to accept the jurisdiction of the court. Accordingly, increasing the range of matters which the Council was authorized to refer to the court did not seem necessary. It might well be advisable to restrict that authorization to cases of aggression which seemed to the Council to pose a threat to international peace and security. There could conceivably even be cases in which the court decided to waive its jurisdiction on the ground that the international conventions referred to in the statute and the annex had not been breached or that a Security Council decision to refer a matter to the court had actually been made on the basis of political pressure even though the Council had given the maintenance of international peace and security as the reason.

47. In spite of those general observations and of other comments that he would make in due course, he regarded the draft statute as a good basis for future negotiations and endorsed the Commission's recommendation that the General Assembly should convene a cumulative plenipotentiary conference. That conference should be held in 1995.

48. Mr. MOMTAZ (Islamic Republic of Iran) said that the question of the legal nature of the association linking the international criminal court to the United Nations was of fundamental importance. Not only would that association safeguard the court's character and moral authority, it would also permit the court, under certain circumstances, to use the services of the United Nations, as provided for in article 2 of the draft. Under that article, the court would be able to conclude an agreement bringing it into relationship with the United Nations, in accordance with Article 57 of the Charter, such agreement to be submitted under Article 62 of the Charter to the General Assembly for approval.

49. The subject-matter of article 3 (3) and article 4 (2) should be dealt with in a separate article entitled "Legal capacity of the court", since any reference to that question in article 3, on the seat of the court, seemed out of place. In article 3 (3), the term "protocol" would be preferable to "agreement".

50. Article 6 (1) made a distinction that seemed unduly rigid. It would be enough to require future judges to meet one of the two requirements.

51. His delegation maintained the reservations it had expressed in 1993 with regard to article 15 of the draft. It preferred the formula used in Article 18 of the Statute of the International Court of Justice, primarily because it was general and did not refer to specific cases, which were bound to be very rare. In addition, the unanimity rule provided sounder guarantees than the rule of a two-thirds majority referred to in article 15 (2), because it would be conducive to the greater independence of the office of judge.

52. Article 20 of the draft statute, one of its most important provisions, presented some problems. For example, the term "grave breaches" used in the four Geneva Conventions and Additional Protocol I of 1977 applied, in reality, to all the cases listed in article 20 (c). Those instruments, especially the four Geneva Conventions, unquestionably constituted the expression of a well-established international custom and, because of the large number of States that had ratified them, were on the same level as the Convention on the Prevention and Punishment of the Crime of Genocide, although they were not accorded the same moral and legal authority. The reference to specific crimes in article 20 seemed highly judicious, inasmuch as it would facilitate the exercise of the court's jurisdiction in various highly specific instances. It seemed to be an unjustifiable omission that article 20 of the draft statute made no mention of the crime of apartheid on the same grounds as genocide.

53. Article 21 should be completed by a provision on acceptance of the court's jurisdiction by the State of which the accused was a national, since nationality represented a specific significant link for purposes of loyalty and jurisdiction. Paragraph 2 of article 21 dealt with that question partially, since, in many cases, the State requesting the surrender of a suspect would be the State of which the accused was a national.

54. Paragraphs 1 and 2 of article 23 had an excellent basis. Unquestionably, under Article 39 of the Charter, only the Security Council could determine the existence of an act of aggression. It also determined the existence of threats to the peace and breaches of the peace, but did not have a monopoly on the consideration of the situations arising therefrom. The jurisdiction of the court would be excessively limited if it was barred from trying suspects while the Security Council was considering such situations. Furthermore, in recent years the Security Council had tended to interpret the notion of "threat to the peace" increasingly broadly and had managed to extend it to cover practically all situations liable to give rise to the crimes categorized in the statute. It did not seem logical to impede the operation of the machinery provided for in the statute on the basis of political statements made in other forums. Consequently, paragraph 3 of article 23 should be deleted.

55. Although the Working Group on a draft statute for an international criminal court had endeavoured to combine the elements of distinct legal traditions in one coherent whole, it appeared that articles 37 and 47 of the text were based on a particular criminal system. Article 37 made provision, in exceptional

cases, for judgement by default. It was curious to note that paragraph 2 (c) permitted trial in absentia if the accused had escaped from lawful custody or had broken bail, whereas the court was not afforded such possibility if the accused had never been arrested. It was not clear what the reasons for that distinction were, or its consequences. While the need to respect the principle enshrined in article 14 of the International Covenant on Civil and Political Rights that the accused must be "tried in his presence" must be recognized, it might be in the interest of the international community for the court to conduct a trial by default and to make known some of the facts to world public opinion; it could at least identify the perpetrators of heinous crimes and thus outlaw them. Moreover, in order to avoid contradictions with the Covenant, it might be possible in such cases not to apply automatically the sentence pronounced by default and to await the appearance of the accused before the court and a revised verdict.

56. Article 47 failed to take into account the fact that many criminal systems continued to impose the death penalty on the perpetrators of the most heinous crimes, in particular those mentioned in the draft statute. The option of determining the length of a term of imprisonment or the amount of a fine should be extended to determination of the penalty generally.

57. The jurisdiction of the court should be limited to the punishment of the most serious crimes of an international character, and the statement of acceptance did not necessarily entail the loss of jurisdiction by domestic courts. On the contrary, the court should assist domestic courts in cases where trial of the accused was difficult or impossible. He hoped that the draft Statute could be considered in the near future at a conference of plenipotentiaries and that the international criminal court would finally become a reality.

58. Mrs. des ILES (Trinidad and Tobago), speaking on behalf of the States members of the Caribbean Community (CARICOM), said that the draft statute for an international criminal court was a balanced instrument offering a number of compromise formulations on fundamental issues, which should facilitate the widest possible acceptance by Member States. As envisaged in article 2 of the draft statute, the court should be established by a multilateral treaty, with a relationship agreement with the United Nations.

59. The jurisdiction of the court should be limited to serious crimes of international concern. The distinction was correctly drawn in article 20 between two categories of crimes: crimes under general international law and crimes under or pursuant to certain treaties listed in the annex to the statute. The court's jurisdiction should be complementary to domestic criminal justice systems. In 1989, when Trinidad and Tobago, with the support of CARICOM members, had reintroduced in the Sixth Committee the idea of the establishment of an international criminal court, it had stated that the establishment of an international criminal court would present to Governments a third option where trial in domestic courts and extradition proved impossible. Such serious crimes as large-scale drug trafficking and the activities associated with it, for

example, money-laundering and acts of terrorism, must be dealt with through an international mechanism.

60. The wording of article 22, which provided that jurisdiction over certain crimes should not be conferred automatically on the court when a State became a party to the statute, was correct. While the "opting-out" system might appear more desirable in principle, it was recognized that an "opting-in" system was more likely to facilitate greater universality of participation in the court.

61. The provisions of Part 4 were generally satisfactory. Resort to the court should be limited to States parties. It was also of fundamental importance that, during the preliminary phase of an investigation, a person suspected of an offence should have all his rights guaranteed, as was provided for in the International Covenant on Civil and Political Rights. The wording of article 32, together with the provisions of article 58, would offer a practical response to the concerns of some small States, which feared that the trial and imprisonment of certain international criminals, such as those engaged in large-scale drug trafficking, could overwhelm their judicial systems and pose a serious threat to their security. The provisions of article 34, which were extremely important, would facilitate the determination of the court's jurisdiction. It would be necessary, however, to define the term "interested State", because too broad an interpretation of that term might not facilitate the work of the court and could stymie its operation.

62. Exceptions to the general rule that an accused person should be present at his trial should be allowed only in clearly defined exceptional cases, such as those proposed in article 37, paragraph 2. In the absence of the accused, all his rights must be respected.

63. The presumption of innocence was an accepted principle in common law. It was up to the prosecution to establish the guilt of the accused. However, it should be noted that the burden of proof was also cast upon the accused, namely the burden of proving the common law defences of consent, duress, self-defence or justification generally. The presumption of innocence was reflected in article 40 of the draft statute, and her delegation supported its inclusion. It also welcomed the provisions of article 47. The protection of victims and witnesses should in no way interfere with the full right of the accused to a fair trial. The provisions of article 44 were satisfactory, in particular the proposal to exclude any evidence obtained by illegal means, which would constitute a serious breach of the statute or of international law.

64. There was no doubt about the urgent need for a permanent international body to take effective action against individuals responsible for exceptionally serious crimes of international concern. The international community had already shown that once the political will was there, such tribunals could be established, as had been done in the case of the International Criminal Tribunal for the former Yugoslavia. However, she did not believe that a corpus of international criminal law could be elaborated through the establishment of ad hoc tribunals. A permanent court would not only contribute to the progressive development of international law but would also punish those who

sought, with impunity, to destroy the very fabric of existing society. Accordingly, she supported the recommendations of the International Law Commission that the draft statute be submitted to Governments within the context of a conference of plenipotentiaries. The General Assembly should establish, at the present session, a mechanism for convening such a conference as soon as possible in order to conclude a convention on the establishment of an international criminal court.

65. Mrs. LADGHAM (Tunisia) thanked the Commission for the efforts it had made at its forty-sixth session and thanked Mr. Crawford, Chairman of the Working Group on a draft statute for an international criminal court, and Mr. Thiam, Special Rapporteur on the draft Code of Crimes against the Peace and Security of Mankind, for the quality of the work submitted.

66. Although the Commission was essentially a technical body, it had to take into account the demands of reality, which did not coincide with those of simple law, and had accepted many of the comments made by delegations, including those of her own delegation; that was very gratifying. However, she had some further comments on the draft, first of all, concerning how the court should be established; Tunisia had already expressed its preference for a court that was an integral part and main organ of the United Nations since that would give it authority comparable to that of the International Court of Justice. If it were created by amendment to the Charter it would be more universal in character than if it were created by a treaty.

67. With regard to the court's jurisdiction, she noted with pleasure that the Commission had taken into account the wish of certain delegations to see the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment included in the list in the appendix. Provision would also have to be made for the possibility of including in the list other relevant legal instruments that might be elaborated in future. The proposed system whereby States could accept the jurisdiction of the court by declaration, except in the case of a crime of genocide, was acceptable.

68. With regard to the applicable law, she considered that the draft Code should constitute the basis for such law. The draft should contain provisions establishing specific penalties for each crime that fell within the court's jurisdiction. The Commission should be urged to proceed swiftly with the elaboration of the draft Code and, of course, to ensure that its provisions were consistent with those of the draft statute for an international criminal court.

69. With regard to the financing of the court, an issue that was closely linked to the establishment of the court, it did not seem very wise to impose that burden on the States Parties to the statute as the Commission was suggesting in draft article 2. Since the court served the interests of the entire international community, it would be preferable to have it financed from the regular budget of the United Nations; that was yet another reason for establishing the court as a main organ of that Organization.

70. Finally, she said that it would be premature to convene a diplomatic conference, given the difficulties that still remained on matters of substance. It would be better to arrange for consultations with a view to ironing out differences of opinion.

71. Mr. HAMAI (Algeria) thanked all members of the Commission for the quality of their report which invigorated the Committee's work each year, and also thanked Mr. Veredechetin for his clear and exhaustive introduction of the report.

72. With regard to chapter II of the report, concerning the draft Code of Crimes against the Peace and Security of Mankind, he paid tribute to the Special Rapporteur, Mr. Thiam, for his work, and expressed satisfaction at the fact that the Commission had resumed consideration of the draft Code, adopted in first reading at the Commission's forty-third session, in response to the mandate conferred by the General Assembly in resolution 48/31. The Commission had considered the general part of the draft Code concerning the definition of crimes, their characterization and the general principles, leaving the second part of the draft concerning crimes themselves. He was pleased that the Special Rapporteur proposed to limit the list of those crimes to violations which it was generally agreed constituted crimes against the peace and security of mankind.

73. He also wished to make certain specific comments: with regard to the definition of crimes, the proposal to adopt a conceptual or general definition, followed by specific reference to the crimes defined in the Code, seemed a satisfactory solution.

74. Article 5 of the draft Code, while limiting criminal responsibility to individuals, did not rule out the responsibility of the State. That article should be read in conjunction with other international legal instruments, such as the Convention on the Prevention and Punishment of the Crime of Genocide of 1948. With regard to article 6, the question arose of the relationship between the draft Code and the draft statute for an international criminal court. In his view, they were two closely linked aspects of the same issue, namely, how to provide the international community with appropriate legal instruments to enable it to prosecute those who committed crimes against the peace and security of mankind; the Code and the statute were two indissociable and complementary instruments, indicative of the success of that undertaking. It was therefore unfortunate that people tended to deal with the issue of the court as though it were a separate issue, and to relegate the issue of the Code to second place. It should be remembered that the idea of establishing an international criminal jurisdiction had been prompted by the need for a judicial organ that would apply the draft Code of Crimes. The issue of the court was simply a sub-item of the overall issue of the elaboration of the draft Code, as was clearly demonstrated by the past history of the issue. Of course, the tragic current international events had conferred particular urgency on the issue of the court, but it would be inappropriate to rush into adopting the statute of a court without first defining the applicable law. In order to overcome that difficulty, the draft statute of the court sought to define, in article 20, which crimes were subject to the court's jurisdiction, providing for five categories. Of those, only the

crime of genocide presented no major obstacle, owing to the existence of the 1948 Convention on that subject. The other categories of crimes, except for aggression, had been included because they had been designated as crimes in the statute of the International Criminal Tribunal for the former Yugoslavia. It was paradoxical that efforts were being made to create an international criminal court that would apply a law defined in the decision of a political organ, the Security Council, making it seem as though the latter were almost the supreme source of international law. International justice required independence from the decisions of political organs; in the current state of positive international law, only by adopting the draft Code could there be a principal basis for the law to be applied by the future court.

75. Other provisions of the draft statute also prompted concern, particularly the method whereby the court would be established, its relationship to the United Nations and its jurisdiction, in the event that the Security Council decided to refer a matter to it under article 23 of the draft statute.

76. Regarding the manner in which the court was to be established, it was not sufficient to do so by means of a treaty, given the uncertainty that that would create with regard to universality, since States could opt not to become parties to the treaty. If, on the other hand, it was established as an organ of the United Nations, not only would the court be backed by the Organization's moral authority and its universal character but the unity of the international legal order in respect of criminal matters would be assured without detriment to the court's independence and autonomy. The argument that, in order to do so, it would be necessary to amend the Charter was not a very convincing one, since concluding a treaty was also a complex process. Moreover, discussions were currently under way on a series of reforms that would also require amendment of the Charter, thus it would be possible to invoke article 109 and to convene a general conference for the purpose of reviewing the Charter.

77. A question directly related to the previous one is the relationship that should exist between the court and the United Nations. The easiest course would be to make it part of the United Nations, preferably as a principal organ like the International court of Justice. The system needs a judicial organ to deal with matters of international criminal law and to fill a genuine legal vacuum and avoid recourse to special judicial bodies. Moreover, establishment of such bodies by a political organ is not unanimously supported for constitutional reasons and considerations of strict adherence to the law.

78. With regard to the competence of the court, article 23 of the draft attributes to the Security Council the authority to bring a complaint directly to the court under Chapter VII of the Charter, thereby derogating from the rule in article 21 which makes the court's competence contingent on State acceptance. There is no denying that the functions assigned to the Security Council by the Charter would be appreciably expanded. The consequences of that expansion had not been given enough thought and more than that, it lacked a sound legal basis. since the proposal did not have the unanimous support of the Commission, the article should be deleted. Furthermore, the proposed solution ignored the

prerogatives of the General Assembly in questions relating to the maintenance of international peace and security.

79. Mr. PREDA (Romania) said that he welcomed the completion of the draft Statute of an international criminal court since it was a well-known deficiency of international law that it lacked effective enforcement mechanisms. So long as there was no judicial organ to try persons committing crimes against the peace and security of humankind, there would be no substantive codification of international law in that field.

80. Referring to the method of establishing the court, he said that it should be by means of an international convention, adopted at a Conference of State Plenipotentiaries. That method had the practical advantage of guaranteeing wide acceptance of the convention, which was a prerequisite for the court's effectiveness and normal functioning. Moreover, it preserved the State's freedom of choice to become a party to the Statute or to accept the jurisdiction of the court. Owing to the complexity of the process, there was a temptation to establish it by virtue of a resolution of the Security Council, but that would exceed the confines of the authority enjoyed by the Security Council under Chapter VII of the Charter. Also, alternative procedures such as amending the Charter or a resolution of the General Assembly or of the Council would raise serious problems that would not be easy to overcome. With respect to the date of the future conference, he wondered whether it might not be appropriate to establish an intersessional ad hoc committee to discuss the issues related to the question.

81. With regard to its relationship to the United Nations, he said that the future court should be linked to the principal organs of the United Nations to enable it to operate effectively from the administrative and functional point of view. However, since it should not be a subsidiary organ, he concurred with the provision of article 2 of the draft statute which called for the conclusion of an agreement with a view to establishing an appropriate relationship.

82. The court should have jurisdiction ratione materiae over a very limited number of very serious crimes. At the present stage, they should include genocide, aggression, exceptionally serious crimes and systematic and large-scale violations of human rights. That assumption was based on the fact that only in exceptional cases were States ready to waive their sovereignty and yield to an international mechanism. He concluded by saying that the text of the draft statute worked out by ILC rightly touched on many issues that might be seen as technical details, but taken together, went to the heart of a fair trial.

83. Mr. KOLODKIN (Russian Federation) said that the work of the Commission at its forty-sixth session had been very productive and that its signal achievement had been the draft statute of an international criminal court. That text should be the basis for further work on the question until its completion because it consisted of rules and solutions that were balanced and reasonable.

84. The court's jurisdiction applied both to international crimes defined by treaties in force and to crimes that contravened international law in general, which were confined to a series of specific cases. The court's jurisdiction should be regarded as a complement of national judicial systems. Its applicability to crimes traditionally covered by the principle aut dedere aut indicare was contingent on the fulfilment of certain conditions and was therefore exceptional. At the same time, in exceptional circumstances in which, in the opinion of the Security Council, those crimes constituted a threat to international peace and security, the jurisdiction of the court became virtually obligatory because the Council, in pursuance of Chapter VII of the Charter and leaving aside the precondition of acceptance in article 21 of the draft, could bring the complaint to the court.

85. The report clearly indicated that conclusion of a convention would be the most acceptable way to establish the court and the modalities of its relationship to the United Nations. Many States, including the Russian Federation, had been gratified to find that its comments had been taken into account in the new text of the draft. That was an important factor and another proof of ILC's expertise in arriving at acceptable compromise solutions on the most controversial issues. Of course, there would still be comments to be made on specific provisions of the draft statute with a view to improving the text, but it was not too much to ask that an effort be made not to alter the balance achieved by the Commission in its work.

86. In the end, beyond specific comments on the various provisions, what was truly important at that stage was to decide whether the international community needed a permanent international criminal court and whether the legal and political conditions existed for the establishment of such a body. His reply to both those questions was in the affirmative. It would really be too bad if the establishment of the court was once again indefinitely postponed.

87. The first United Nations attempts to establish a permanent criminal court were actually made in the late 1940s. In 1951, on instructions of the General Assembly, the Commission on International Criminal Jurisdiction prepared a draft statute of an international criminal court, but the time was not yet ripe and it never got off the ground. It would have been surprising if it had fared otherwise, but it would be more surprising and highly doubtful that history would now repeat itself, given the decisive changes that had occurred on the international scene. Today there were universal values shared by all human beings that had become part of general international law, international treaties and conventions and the general principles of law. Moreover, a precedent had been established for the establishment of an international criminal tribunal outside the context of the "conqueror-conquered" relationship and that had justifiably raised expectations in the international community. The time had come for the United Nations, which was created for the purpose of preserving peace and protecting generally recognized principles of law against attack by individual criminals and groups of criminals, to establish a permanent international criminal court.

88. It was understood that the completion and finalizing of the draft statute would take some time, but one or two years more did not matter; what did matter was to take a decision now that clearly demonstrated the political will of the Member States to give it practical effect. To that end, a preparatory commission should be set up with the mandate of organizing, within a fixed time-limit, a United Nations conference for the specific purpose of adopting the convention establishing the international criminal court. That was the response the international community expected from the Organization.

89. Mrs. FLORES (Uruguay) said that the forty-sixth session of the Commission had proved very productive, in particular with regard to the draft statute for an international criminal court and the law of the non-navigational uses of international watercourses.

90. Referring to the former, she said that although it dated back several decades, it was now a matter of priority following General Assembly resolution 47/33 of 25 November 1992. The process had to a large extent been speeded up by circumstances motivating the establishment by the Security Council of an International Criminal Tribunal for the Former Yugoslavia as well as the possibility of extending its mandate to include human rights violations in Rwanda.

91. The prospect of an increasing number of special courts and possible as to the reliability, consistency and absence of uniformity in the applicable law, not to mention the need for an appropriate response to situations of particular international tension, all meant that the matter was currently of special relevance. She therefore supported the suggestion contained in paragraph 17 of the Commission's report for the convening of an international conference of plenipotentiaries to study the draft statute and to conclude a convention on the establishment of an international criminal court. Furthermore, Uruguay believed that in view of its status the court must be an organ of the United Nations.

92. Given the nature, complexity and specific activities of the court as well as the increasing number of cases that might come under its jurisdiction, she was in favour of a permanent body working on a full-time basis. None the less, she understood those who preferred a more flexible solution for its gradual implementation, bearing in mind the possible economic and practical difficulties involved.

93. The law applied must be international public law, although that was an issue which required further consideration. For that reason, and since the issue was closely but not exclusively related to the draft Code of Crimes against the Peace and Security of Mankind, it would be advisable if the draft statute were finalized as soon as possible.

94. Questions relating to the jurisdiction of the court formed the backbone of the draft statute and were dealt with in Part 3. As far as jurisdiction ratione materiae was concerned, under present circumstances it seemed possible that the court would try individuals only. Notwithstanding, the provisions of article 20 of the draft statute should be brought into line with those of article 19 on the

responsibility of States, which distinguished between international crimes and offences and circumstances where the State, apart from being obliged to provide reparation for the crime committed was also liable to sanctions. Furthermore, the definition of the crime of aggression (article 20 (b) of the draft statute) must be clarified, for according to General Assembly resolution 3314 (XXIX), such crimes could only be committed by States; it should also be made consistent with article 15 of the draft Code of Crimes against the Peace and Security of Mankind. She also had reservations regarding the provisions of article 23.

95. Jurisdiction ratione materiae was extremely complex and it was therefore essential to ensure the proper application of the two principles of criminal law: nullum crimen sine lege and nulla poena sine lege, which had been partially taken up in the draft statute.

96. Although international law did not prohibit, from a strictly legal standpoint, trials in absentia, the current trend in human rights was to limit that type of trial, as indicated in article 14, paragraph 3 (d), of the International Covenant on Civil and Political Rights.

97. Uruguay had already indicated that it was in favour of the prosecutor and agreed with the structure proposed in the draft statute.

98. Mr. RABBANI (Pakistan) said that the enactment of substantive law would be required to implement the provisions of article 19, paragraph 1 (b). While article 19, paragraph 2, provided that the procedural details should be established by the rules of the court, in order to ensure an impartial judicial process such rules must form part of the statute. Moreover, the crimes enumerated in article 20 must be more clearly defined, in particular the term "aggression".

99. The provisions relating to enforcement described in Part 8 of the draft statute were a cause for concern, for they would raise important constitutional issues for many Member States. As an alternative, the court orders could be carried out in conformity with the various provisions defined under international law.

100. Article 23, paragraph 3, required further consideration, since the possibility of judicial proceedings being politicized as a result of action taken by the Security Council could not be ruled out.

101. Substantive law, procedural law and the rules of the court would have to be clearly spelt out in order to guarantee the civil rights of suspects and those accused. Otherwise, it would be difficult for Member States to cooperate in that regard. In the international justice system special attention should be given to protecting the rights of the accused, taking into account factors that might not often be of relevance in the national context.

102. With a view to avoiding any ambiguities, the provisions in respect of qualifications required by judges, disciplinary action they might be liable to and investigation and trial procedures must be specified in clearer terms.

103. The court should complement national criminal justice systems and should sit as and when required. Furthermore, its jurisdiction should be confined to individuals and should not involve States, which would be contrary to the principle of sovereignty and sovereign equality of States.

104. The establishment of an international criminal court, with the subsidiary organs mentioned in article 5 and other infrastructures, would entail an enormous financial outlay which might be an extra burden for the developing countries.

105. No real progress would be made unless substantive criminal laws were developed, international crimes accurately defined and penalties for them were prescribed. The establishment of an international criminal court involved many complex and difficult issues, such as jurisdiction, applicable law, court structure, prosecution and other matters which must be addressed with utmost care.

The meeting rose at 1.10 p.m.